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SUPREME COURT OF KENTUCKY
FILE NO. 2013-SC-000420-D
COURT OF APPEALS 2013-CA-00018-MR

MIKAIL SAJJAD MUHAMMAD **APPELLANT**

APPEAL FROM OLDHAM CIRCUIT COURT
HON. KAREN A. CONRAD, JUDGE
CIVIL ACTION NO. 12-CI-00807

KENTUCKY PAROLE BOARD **APPELLEE**

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellee was served by first class mail, postage prepaid, this 2nd day of September 2014, upon the Honorable Karen A. Conrad, Judge, Oldham Circuit Court, Judge, Oldham Circuit Court, Oldham County Courthouse, 100 W. Main Street, LaGrange, KY 40031; and to Aaron Reed Baker, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky, 40601. I further certify that the Record on Appeal has not been removed from the Clerk's office.

COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

In the opinion of Appellee, oral argument would not be of assistance to the Court because the issues presented by this appeal are relatively simple and have been fully addressed in the briefs.

COUNTERSTATEMENT POINTS AND AUTHORITIES

A. Habeas is not the appropriate mechanism for bringing Appellant's action

B. The Parole Board did not exceed its discretion or authority in deciding to revoke Appellant's sex offender conditional discharge.

1. Subsequent to H.B. 463, the Commonwealth Attorney has no legal authority to use final judgments of SOCD from prior criminal cases as bargaining chips in plea negotiations in ongoing criminal prosecutions.

2. Unlawful or unauthorized plea agreements are not enforceable in Kentucky, and thus, specific performance is not required.

3. Promissory estoppel does not apply to contractual relationships in Kentucky

4. Equitable estoppel is not applicable.

5. Mutual mistake of the legal effect of plea agreement does not stablish a breach of the plea agreement.

COUNTERSTATEMENT OF THE CASE

On November 16, 2007, the Appellant, Makail Sajjad Muhammad (aka Michael S. West) pled guilty and was convicted in Fayette Circuit Court, Criminal Action No. 07-CR-00944, on one (1) count of Sexual Abuse in the First Degree. (Record at 242). Subsequently, on January 18, 2008, the Fayette Circuit Court sentenced Appellant to two (2) years in prison and a five (5) year period of sex offender conditional discharge[1] ("SOCD"). (Record at 242-244). At the expiration of the two (2) year prison sentence, Appellant was released to SOCD supervision under written Conditions of Supervision which included as a condition of supervision that Appellant not violate any law or ordinance while on supervision. (Record at 240, 248).

On March 3, 2011, House Bill 463 was enacted. 2011 Ky. Acts, ch.2, sec. 91 (2011 Reg. Sess.). House Bill 463 amended KRS 532.043 to eliminate a provision granting the Commonwealth Attorney the responsibility of initiating SOCD revocation proceedings by filing a motion with the sentencing court. Under House Bill 463, responsibility under KRS 4532.043 for reporting violations of supervision and initiating revocation proceedings was granted to the Department of Corrections' Division of Probation and Parole, while the Parole Board was granted responsibility over determining whether probable cause exists to revoke an offender's SOCD supervision and reincarcerate the offender. (Record at 258, 259).

In May 2011, Appellant entered an Alford plea in Fayette Circuit Court in Criminal Action 10-CR-00977, and was convicted on charges of Receiving Stolen Property over $500.00 and being a Persistent Felony Offender in the Second Degree.

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[1] House Bill 463 2011 Ky. Acts, ch.2, sec. 91 (2011 Reg. Sess.) (Effective March 3, 2011), amended KRS 532.043 to substitute the term "postincarceration supervision" for "sex offender conditional discharge."

(Record at 2). He was sentenced to a term of eight (8) years. (*Id.*). Subsequently, Appellant filed a motion to withdraw his plea on grounds that his appointed counsel had not advised him that his SOCD could be revoked due to the new felony conviction for a crime committed while on SOCD supervision. (*Id.*).

On October 14, 2011, Appellant appeared in open court with his attorney, Katherine M. Paisley, and entered a plea of guilty to one (1) count of Receiving Stolen Property Over $500.00, the Court noting the Commonwealth's recommendation of a sentence of three (3) years prison, "with the understanding that the Commonwealth will not move to revoke [Appellant's] Conditional Discharge." (Record at 250, 277-279). Appellant was then sentenced to a term of there (3) years prison, the sentence to run consecutive with any other previous felony sentence. (Record at 251, 278).

On October 18, 2011, Probation and Parole Officer Elizabeth R. Russell initiated revocation proceedings by serving the Appellant and the Parole Board with a Notice of Preliminary Hearing charging Appellant with violating the conditions of his SOCD supervision by receiving a new felony conviction in Criminal Action No. 10-CR-00977 for a crime committed while on supervision. (Record at 260)-

In an affidavit sworn to by attorney Katherine M. Paisley on November 10, 2011, Ms. Paisley avered that "Mr. Muhammed (*sic*) entered into a guilty plea in which the Commonwealth agreed not to ***move*** to revoke his conditional discharge," and that she "erroneously advised Mr. Muhammed (*sic*) on the law regarding the Commonwealth's authority; an error that he relied upon in making his decision to plead guilty." (Record at 256, 257).

On November 14, 2011, Appellant was brought before Administrative Law Judge Nancy Barber for a Preliminary Revocation Hearing. (Record at 239-241). Appellant was represented at the hearing by attorney Matthew Ryan. (Record at 239). The ALJ found probable cause existed to believe that Appellant had violated the terms of his SOCD supervision, and referred the matter to the Parole Board for a Final Revocation Hearing. (Record at 239-241. The ALJ's written decision issued after the hearing states that Appellant "testified that he entered his guilty plea based upon the advice of his attorney, Hon. Katherine Paisley Exhibit A) and the plea agreement negotiated with Fayette County Commonwealth Attorney's Office." (Record at 240). Subsequently, the Parole Board revoked Appellant's SOCD supervision following the Final Revocation Hearing on March 22, 2012.

Attorney Katherine M. Paisley wrote a letter to Appellant dated June 5, 2012 in which she stated to Appellant "[y]out are correct, ***I improperly advised you regarding which department had the authority to revoke your conditional discharge.***" (Record at 281) (emphasis added). Ms. Paisley then stated that [t]he appropriate remedy at this point is not a motion to withdraw your guilty plea, but to file an RCr 11.42 against me." (Record at 281).

On August 7, 2012, Appellant filed Motion to Vacate, Set Aside or Correct Sentence Pursuant to RCr 11.42 on grounds of ineffective assistance of counsel in Fayette Circuit Court, Criminal Action Nos. 07-CR-00944 and 10-CR-00977. (Record at 262 - 274). In the Appellant's Memorandum of Law in Support of the motion, Appellant contended that "[c]ounsel's error in advising the Movant that his SOCD would not be violated pursuant to his plea fell outside the wide range of professionally competent

assistance and so seriously affected the outcome of the proceeding that it caused the Movant to plead guilty where he would have otherwise opted to go to trial. " (Record at 271). Appellant contended that "[a]llowing counsel to be examined at an evidentiary hearing concerning this issue will demonstrate on the record Movant's assertions of counsel's ineffectiveness without the court having to delve into guesswork, assumptions, or the distortion of hindsight." (Record at 272).

Subsequently, in October of 2012, Appellant abandoned his Motion to Vacate, Set Aside or Correct Sentence in Fayette Circuit Court, Criminal Action Nos. 07-CR-00944 and 10-CR-00977, and instead filed his Petition for Writ of Habeas Corpus in Oldham Circuit Court, Civil Action 12-CI-00807. (Record at 1-6).

The Oldham Circuit Court conducted a hearing on November 2, 2012, and then on November 30, 2012, an order was entered granting the Petition for Writ of Habeas Corpus. (Record at 302). The Parole Board appealed, and on May 13, 2013, the Court of Appeals issued an Order in Appeal No. 2013-CA-000018 reversing the order of Oldham Circuit Court. Discretionary review was granted on December 11, 2013.

ARGUMENT

A. Habeas is not the appropriate mechanism for bringing Appellant's action

In his Brief, the Appellant concedes that he is challenging the Parole Board's decision to revoke his SOCD supervision, not the Fayette Circuit Court's final judgment imposing SOCD as part of his sentence. (Brief for Appellant at 15). The proper mechanism in Kentucky for challenging a decision of the Parole Board is to file a petition for writ of mandamus in circuit court. *Shepherd v. Wingo,* 471 S.W.2d 718 (Ky.1971), quoting *Board of Prison Com'rs v. Crumbaugh*, 161 Ky. 540, 170 S.W. 1187, 1188 (Ky. 1914) ("If the [Parole] board should in any case abuse its authority in rearresting a convict, the remedy is by a proceeding in the circuit court of the proper county to obtain a writ of mandamus requiring the board to proceed properly, and in that judicial proceeding the facts may all be shown . . . ."). *See also Mahan v. Buchanan*, 310 Ky. 832, 221 S.W. 945 (Ky.1949); *Wingo v. Lyons*, 432 S.W.2d 821 (Ky.1968); *Jones v. Black*, 468 S.W.2d 274, 275-276 (Ky.1971).

Habeas corpus is "an extraordinary remedy only available under limited circumstances." *M.M. v. Williams.* 113 S.W.3d 82, 84 (Ky. 2003). The writ of habeas corpus cannot be issued unless a petitioner establishes by affidavit probable cause that he or she "is being detained without lawful authority or is being imprisoned when by law he is entitled to bail." KRS 419.020. In regard to prisoners released to parole supervision, it has long been the law in Kentucky that a prisoner on parole "remains subject to [the board's] control, and, if he violates the parole, may be rearrested and placed again in prison. *Crumbaugh*, 170 S.W. at 1188. As further stated in *Crumbaugh*:

> The prisoner who has been paroled and has subsequently been rearrested under a warrant by the board ***is not illegally detained in custody.*** The writ of habeas corpus may be used to release from custody persons who are held in custody illegally; but, under this summary process, the officer issuing it in the case of a paroled convict, rearrested upon the order of the board, ***cannot go behind the order of the board, for the board has authority by law to issue the warrant, and the detention of persons under the warrant is not without authority of law.***"

Id. (emphasis added).

Since the adoption of H.B. 463 on March 3, 2011, prisoners released to SOCD supervision are likewise subject to the Parole Board's control. *See* KRS 439.346 ("During the period of his or her parole or postincarceration supervision, the prisoner shall be amenable to the orders of the board and the department."). Under H.B.463, the Parole Board has been granted express statutory authorization to issue warrants for the arrest of offenders charged with violations of the conditions of their SOCD supervision. KRS 439.330(1) ("The Board shall: (e) Issue warrants for persons charged with violations of parole and postincarceration supervision and conduct hearings on such charges, subject to the provisions of KRS 439.341, 532.043, and 532.400"). Furthermore, H.B. 463 amended KRS 532.043(5) to eliminate the Commonwealth Attorney's involvement in the revocation process, and instead mandate that "[i]f a person violates a [condition of supervision] specified in subsection (3) of this section, ***the violation shall be reported in writing by the Division of Probation and Parole,***" and that ***"[n]otice of the violation shall be sent to the Parole Board to determine whether probable cause exists to revoke the defendant's postincarceration supervision and reincarcerate the defendant as set forth in KRS 532.060.***" (emphasis added).

Applying the reasoning of Crumbaugh, *supra,* to the Appellant and other prisoners released to SOCD supervision who have been rearrested since the effective date of H.B. 463 on a revocation warrant issued by the Parole Board likewise are not being illegally detained in custody, and habeas corpus is therefore not available to them. *Id.* Thus, The Court of Appeals was correct in holding in the action below that Appellant was not entitled to habeas corpus because the Parole Board's actions were authorized by statute. The Order of the Court of Appeals should therefore be affirmed.

The Court of Appeals was also correct in holding that there is a second reason that it is inappropriate for Appellant to bring his claim as a habeas action, in that habeas corpus is not available where a petitioner could have proceeded by direct appeal or a collateral attack. Wingo v. Ringo, 408 S.W.2d 469 (Ky.1966). Habeas corpus proceeding should not be entertained unless the petitioner has established the inadequacy of other available remedies. *Id.*; Waddle v. Howard, 450 S.W.2d 233, 234 (Ky.1970).

Appellant contends that pursuing his RCr 11.42 motion in Fayette Circuit Court would provide inadequate relief due to the time it might take. (Appellant's Brief at 14-15). In particular, Appellant states that "[i]f the sentence were vacated, [he] might proceed to trial and prevail, but he would not get back the time already spent in prison." (Record at 15). However, the mere fact that a habeas corpus proceeding may be more expeditious than other procedures does not establish the inadequacy of the alternative procedures. Richardson v. Howard, 448 S.W.2d 49, 50-51 (Ky.1969).

Appellant also asserts that RCr 11.42 relief is not adequate because the three (3) year time limit of RCr 11.42 (10) has passed and because he is no longer serving his sentence for the 2011 conviction. (Brief for Appellant at 13-15). These arguments were

not raised by Appellant in the action below. An issue must be to be properly preserved in the trial court or intermediate appellate court prior to consideration by a higher appellate court. *Personnel Bd. v. Heck*, 725 S.W.2d 13, 18 (Ky.App.1986). The Appellant's failure to properly preserve the alleged error in courts below effectively waived any right to appellate consideration. *Id.* Moreover, the Appellant's delay in pursuing other remedies while available does not make such remedies inadequate. Appellant could have continued to pursue his RCr 11.42 motion filed in Fayette Circuit Court on grounds of ineffective assistance of counsel, instead of dismissing it in favor of a habeas action. *See Gray v. Wingo*, 423 S.W.2d 517 (Ky. 1968).

In any event, Appellant had other adequate avenues of relief. To the extent Appellant appears to believe that the Commonwealth Attorney and his former DPA counsel at the time of the 2011 plea agreement engaged in deliberately misleading conduct by negotiating a plea agreement under which "the Commonwealth will not move to revoke the Defendant's Conditional Discharge" (Record at 277, 296), Appellant could have could have chosen to file a CR 60.02 motion for relief from the judgment on grounds of fraud affecting the proceedings, other than perjury or falsified evidence. CR 60.02(d).

Furthermore, since the Appellant has made it clear in his Brief that he is only interested in challenging the Parole Board's decision to revoke his conditional discharge, the proper mechanism for challenging the decision of the Parole Board would have been to file a petition for a writ of mandamus in circuit court. *Shepherd v. Wingo*, 471 S.W.2d 718 (Ky.1971), quoting *Crumbaugh*, 170 S.W. at 1188. *See also Mahan v. Buchanan*,

310 Ky. 832, 221 S.W. 945 (Ky.1949); *Wingo v. Lyons*, 432 S.W.2d 821 (Ky.1968); *Jones v. Black*, 468 S.W.2d 274, 275-276 (Ky.1971).

B. The Parole Board did not exceed its discretion or authority in deciding to revoke Appellant's sex offender conditional discharge.

Even if Appellant had brought his action as a petition for writ of mandamus, the Appellant would not be entitled to relief. For the reasons stated below, the Parole Board's decision to revoke Appellant's sex offender conditional discharge was within the Board's discretion and authority

1. Subsequent to H.B. 463, the Commonwealth Attorney has no legal authority to use final judgments of SOCD from prior criminal cases as bargaining chips in plea negotiations in ongoing criminal prosecutions.

Appellant failed to cite any legal authority for the proposition that a Commonwealth Attorney's general plea bargaining authority under the common law would be broad enough to allow the Commonwealth Attorney to use promises regarding revocation of SOCD ordered in prior, unrelated criminal convictions as bargaining chips in pending criminal prosecutions, absent some specific statutory authority allowing such a practice. Sex offender conditional discharge supervision did not exist at common law. It is a creation of statute, and falls outside the scope of the prosecutor's common law authority over decisions to bring or dismiss criminal charges.

The pre - H.B. 463 version of, KRS 532.043 granted the Commonwealth Attorney discretion to determine whether or not to refer to institute SOCD revocation proceedings by filing a motion in circuit court. However, H.B. 463 amended KRS 532.043 to eliminate the Commonwealth Attorney's role in the SOCD revocation process,

transferring those functions to the Department of Corrections and the Parole Board instead. Thus, by the time of Appellant's October 2011 plea agreement, the Commonwealth Attorney has no authority to decide whether or not Appellant's conditional discharge should be revoked.

Since the enactment of H.B. 463 on March 3, 2011, the Commonwealth Attorney would have no more authority to enter into a plea bargain waiving the Parole Board's authority over revocation proceedings than the Commonwealth Attorney would have to enter into a plea agreement waiving the Kentucky Medical Board's authority to revoke or suspend a physician's medical license due to a new felony conviction, or the Kentucky Bar Association's authority to suspend an attorney's license to practice law in Kentucky due to a new felony conviction.

In his Brief, the Appellant appears to contends that the Commonwealth Attorney would somehow be authorized to plea bargain away the Parole Board's H.B. 463 authority over SOCD revocation decisions by virtue of the Commonwealth Attorney's status as a an executive branch official. (Brief for Appellant at 5-8). The Appellant apparently contends that in the absence of a statute specifically ***forbidding*** the Commonwealth Attorney from exercising the authority of another executive branch agency or officer, the Commonwealth Attorney would somehow be free to usurp the Parole Board's authority over sex offender conditional discharge revocation

In reality, once the General Assembly assigns a statutory function, power or duty to a particular executive branch agency or official, there is no authority to transfer the function to a different agency or official, unless the Governor issues a temporary executive order pursuant to KRS 12.028, or General Assembly amends the statute to

transfer the function, power or duty. *See* Brown v. Barkley, 628 S.W.2d 616, 623 (Ky. 1982); KRS 12.028. The Commonwealth Attorney has no inherent authority to assume control over functions the General Assembly has assigned by statute to other agencies or officers. Kentucky's Constitution grants the General Assembly the power to abolish the office of Commonwealth Attorney (Ky. Const. §108). Thus, the General Assembly also has the power to limit the functions of the Commonwealth Attorney or to reassign those functions to other executive branch agencies or officials. *Id.* This is exactly what the General Assembly did in adopting H.B. 463. The General Assembly amended KRS 532.043 to affirmatively remove the Commonwealth Attorney from the sex offender conditional discharge revocation process, and to reassign those functions to the Department of Corrections and the Parole Board.

In addition, Appellant appears to argue in his Brief that the Commonwealth Attorney's general authority to prosecute criminal matters pursuant to KRS 15.725 somehow confers apparent authority on the Commonwealth Attorney to use plea agreements to circumvent the statutory authority of the Parole Board or DOC over SOCD revocation proceedings.

Apparent authority "is the authority the agent is ***held out by the principal as possessing***." Mill Street Church of Christ v. Hogan, 785 S.W.2d 263, 267 (Ky.App.1990). It must be traceable to some act or manifestation of the principal. Ping v. Beverly Enterprises, Inc. 376 S.W.3d 581 (Ky.2012). The Commonwealth Attorney's general authority over the bringing and dismissal of criminal charges pursuant to KRS 15.725 does not show that the Commonwealth Attorney is being held out as having apparent authority to bind the Commonwealth to unlawful or unauthorized plea

agreements. The fact that KRS 532.043 was amended by House Bill 463 specifically to eliminate the Commonwealth Attorneys' involvement in SOCD revocation matters, and that the statute was changed to assign those function to the Department of Corrections and the Parole Board, demonstrates that the Attorney General is not being held out as having authority over SOCD revocation proceedings. The person alleging the agency relationship or apparent authority has the burden of proving that it exists. *Mill Street Church of Christ,* 785 S.W.2d at 267.

The Appellant's novel, open-ended concept of "apparent authority" has no basis in law. It would turn existing principles of agency law on their ear by extending "apparent authority" *ad hoc* without regard to whether the principal's actions had anything to do with creation of the alleged perception of "apparent authority. This would undermine the most critical element of the agency relationship, the right of the principal to control the agent. *See Phelps v. Louisville Water Co.,* 103 S.W.3d 43, 50 (Ky.2003). The person alleging agency and resulting authority has the burden of proving that it exists. *Mill Street Church of Christ,* 785 S.W.2d at 267.

In sum, the Commonwealth Attorney did not have actual or apparent authority to enter into any plea agreement purporting to prevent the Parole Board or DOC from exercising their statutory authority under House Bill 463 over SOCD revocation proceedings.

2. Unlawful or unauthorized plea agreements are not enforceable in Kentucky, and thus, specific performance is not required.

Assuming *arguendo* that Parole Board's decision to revoke Appellant's sex offender conditional discharge violated the October 18, 2010 plea agreement,[2] the Appellant is unable to cite any existing legal authority in Kentucky indicating that specific performance would be appropriate under the circumstances of this case. Kentucky applies the "widely recognized principle of contract law ... that agreements that run contrary to law, or are designed to avoid the effect of a statute, are illegal and will not be enforced." *Skiles v. Com.*, 757 S.W.2d 212, 215 (Ky.App.1988) (Plea agreement and judgment of five year prison sentence was not authorized by statute, which required penalty range of ten to twenty years); *McClanahan v. Com.*, 308 S.W.3d 694, 701 (Ky.2010) (Plea agreement for sentence above statutory maximum unenforceable), *overruling Myers v. Com.*, 42 S.W.3d 594 (Ky.2001); and *Johnson v. Com.*, 90 S.W.3d 39 (Ky.2002). *See also S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 821 (Ky.App.2008); *Com. v. Whitworth*, 74 S.W.3d 695, 700 (Ky.2002) ("[A] contract is void *ab initio* if it seriously offends law or public policy[.]"); *State Farm Mut. Auto. Ins. Co. v. Fletcher*, 578 S.W.2d 41, 43 (Ky.1979) (Public policy will not permit a contract to bring about one result when a statute requires the opposite result.)

Thus, specific performance is not generally available in Kentucky when a plea agreement is contrary to law, or if it is designed to avoid the effect of a statute. Cases cited in the Appellant's Brief from other jurisdictions are not are not controlling. (*See* Brief for Appellant at 9-12). A number of jurisdictions follow Kentucky's approach.

In addition, the Parole Board notes that enforcement of a plea agreement purporting to prevent the Parole Board from performing its statutory duties under the post-House Bill 463 version of KRS 532.043 regarding SOCD revocation would be an egregious violation of the public policy underlying H.B. 463. The Commonwealth's Sentencing Policy adopted pursuant to House Bill 463 is set forth in KRS 532.007. It provides that "[t]he primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced." KRS 532.007(1).

The Parole Board, the Department of Corrections and the Courts all have crucial roles in the implementation of House Bill 463 reforms targeted to reduction of recidivism and improvement of outcomes for offenders. Offenders convicted of felonies committed while on supervision are among the most concerning examples of recidivism. Thus, a plea agreement purporting to prevent the Parole Board from revoking the supervision of an offender convicted of a felony committed while on supervision presents an obvious violation of the public policy of H.B. 463.

3. Promissory estoppel does not apply to contractual relationships in Kentucky

Some jurisdictions outside Kentucky have blurred the distinction between promissory estoppel and bargained-for exchanges. *Davis v. Siemens Medical Solutions USA, Inc.*, 399 F.Supp.2d 785, 796 (W.D.Ky.2005) (Identifying *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2nd Cir.1976) as a decision "suggesting the applicability of estoppel to a negotiated plea bargain alleged to be unenforceable due to

[2] The Parole Board asserts that the Commonwealth Attorney complied with terms of the plea agreement set

its illegality."). However, the doctrine of promissory estoppel is "fundamentally different from a contract." *Id.* at 797. Promissory estoppel is not an alternative to a standard breach of contract claim. *Id.* at 795. Instead, it is an independent theory of recovery. *Id.*

The purpose of promissory estoppel, as it exists in Kentucky and the large majority of jurisdictions, is to make enforceable "gratuitous promises" that would ordinarily be unenforceable as "unsupported by consideration." *See Id. at 797; McCarthy v. Louisville Cartage Co., Inc.*, 796 S.W.2d 10, 12 (Ky.App.1990) ("The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts of a given case.").

In his Brief, Appellant contends that "the principle of estoppel must prevent the Commonwealth from upholding its end of the bargain." (Brief of Appellant at 8). However, Appellant also asserts that the plea agreement at issue in the present case supported by consideration. *(Id.)* ("[Appellant] has even performed his half of the bargain . . . ."). Thus, promissory estoppel is not applicable in the present case.

4. Equitable estoppel is not applicable.

Under Kentucky law, "equitable estoppel requires both a material misrepresentation by one party and reliance by the other party." *Fluke Corporation v. LeMaster*, 306 S.W.3d 55, 62 (Ky.2010) (discussing the elements of an equitable estoppel defense). Even then, equitable estoppel does not apply to government agencies except in "truly extraordinary" circumstances. *Kentucky Retirement Systems v. Grant*, 257 S.W.3d 591 595 (Ky.App.2008) An example of the type of extraordinary

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forth in the October 18, 2010 Judgment by refraining from file a motion in court moving to revoke Appellant's conditional discharge.

circumstance required before equitable estoppel might apply to a government agency would be "where the agency deliberately misleads a party and then acts against the party for relying on the misinformation." *Id.* (quoting *Vance v. Kentucky Office of Ins.*, 240 S.W.3d 675, 678 (Ky.App.2007).

It is also noted that a party to an agreement cannot avoid through estoppel the operation and legal consequences of clear legislative requirements. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 820-821 (Ky.App.2008) (plea agreement intended to avoid the effect of KRS 199.520(2) held unenforceable). If the agreement is unconstitutional or contrary to law, "it follows that equitable estoppel considerations are likewise not applicable[.]" *S.J.L.S.*, 265 S.W.3d at 821. "[I]f a contract is void because against public policy, or for any other reason, it cannot be given vitality through the operation of an estoppel, which would be but a recognition and enforcement of the void contract through the indirect means of an estoppel when it would not be recognized or enforced without the estoppel." *S.J.L.S.*, 265 S.W.3d at 821, *quoting Looney v. Elkhorn Land & Improvement Co.*, 195 Ky. 198, 242 S.W. 27, 28 (1922).

In the present case, assuming *arguendo Appellant's* allegations that the terms of the plea agreement preclude the Parole Board and DOC from carrying out their statutory responsibilities pursuant to KRS 439.330, 439.346, 532.043 and 532.060, the agreement would be unenforceable as being contrary to law and public policy, or in violation of the separation of powers doctrine, for all the reasons stated *supra*. As a result, "it follows that equitable estoppel considerations are likewise not applicable[.]" *S.J.L.S.*, 265 S.W.3d at 821.

The Parole Board also notes that no evidence has been presented showing that the Parole Board or the Commonwealth Attorney ever made any material misrepresentations of fact to Petitioner. A mutual mistake of the legal effect of the Commonwealth Attorney's agreement not to ***move*** to revoke Appellant's conditional discharge does not provide grounds for application of equitable estoppel.

5. Mutual mistake of the legal effect of plea agreement does not establish a breach of the plea agreement.

The Appellant's contention that the plea agreement required anything from the Commonwealth Attorney besides refraining from filing a motion for the circuit court to revoke Appellant's SOCD is premised on Appellant's belief that the Court should ignore the plain language of the plea agreement, and instead, construe it to include terms the parties never contemplated or agreed upon.

The written terms of the plea agreement were that "the Commonwealth agrees **not to move to revoke** Defendant's conditional discharge. (Record at 250, 277). The plain and unambiguous meaning of plea agreement language is that the Commonwealth Attorney agreed to refrain from filing a motion in circuit court to revoke Defendant's sex offender conditional discharge. Moreover, The Appellant "has already recognized that the plain language of the plea bargain was upheld [by the Commonwealth Attorney]." (Record at 295). Thus, it is undisputed that the Commonwealth Attorney has complied with the plain language of the plea agreement by not filing any motion in circuit court to revoke Appellant's SOCD. (*Id.*).

Appellant would have the Court engage in speculation over what may have been said or contemplated while the Commonwealth Attorney and Appellant's former counsel

Katherine Paisley, negotiated the plea agreement between them, and leap to the conclusion that it was intended as a "deal with the Commonwealth not to revoke [Appellant's] postincarceration supervision." (Brief of Appellant at 4). However, where the terms of a written contract are plain and unambiguous, parol evidence of prior or contemporaneous conversations or declarations tending to substitute new or different terms is inadmissible under the parol evidence rule. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970). Here, the plain language of the plea agreement provides only that the Commonwealth Attorney will not move to revoke Petitioner's conditional discharge. (Record at 250, 277). Nothing in the written plea agreement prevents DOC from carrying out its statutory duty under KRS 532.043 to report SOCD violations to the Parole Board for institution of revocation proceedings, or the Parole Board from performing its duties under KRS 439.330, 532.043, and 532.060 to determine whether a violation had occurred, and if so, whether to revoke SOCD and return the offender to prison in accordance with KRS 532.060.

Furthermore, even assuming *arguendo* the language of the plea agreement was deemed to be ambiguous, Appellant has failed to present any probative evidence establishing that the plea agreement was intended to require anything besides the Commonwealth Attorney refraining from filing a motion in circuit court to revoke Appellant's conditional discharge. If Appellant had chosen to pursue a mandamus action or his RCr 11.42 motion in Fayette Circuit Court instead of a habeas action held on short notice in Oldham Circuit Court, witnesses and records of court proceedings could have been produced.

As it turned out, the only items of extrinsic evidence included in the record in this action relevant to the interpretation of the intended meaning of the plea agreement are attorney Katherine Paisley's affidavit notarized November 10, 2011 (Record at 256-257), and her letter to the Appellant dated June 5, 2012 (Record at 281), each of which demonstrate quite clearly that Ms. Paisley understood the plea agreement as being limited to requiring the Commonwealth Attorney to refrain from filing a motion in circuit court to revoke Appellant's conditional discharge.

In her affidavit of November 10, 2011, Ms. Paisley avered that "Mr. Muhammed (*sic*) entered into a guilty plea in which the Commonwealth agreed **not to move** to revoke his conditional discharge," and that she "erroneously advised Mr. Muhammed (*sic*) on the law regarding the Commonwealth's authority; an error that he relied upon in making his decision to plead guilty." (Record at 256-257). Likewise, Ms. Paisley states in her June 5, 2012 letter to Appellant that "[y]ou are correct, ***I improperly advised you regarding which department had the authority to revoke your conditional discharge.***" (Record at 281) (emphasis added). Ms. Paisley then stated that [t]he appropriate remedy at this point is not a motion to withdraw your guilty plea, but to file an RCr 11.42 against me." (Record at 281).

Thus, it is clear from Ms. Paisley's affidavit and letter that ***Ms. Paisley interpreted the plea agreement*** she had negotiated with the Commonwealth Attorney ***as binding only the Commonwealth Attorney,*** and requiring the Commonwealth Attorney only to refrain from the filing of a motion in circuit court for revocation of Appellant's SOCD. Even more importantly, Ms. Paisley's affidavit and letter clearly establish that ***this is what she advised the Appellant when she explained the plea agreement to the***

Appellant. Furthermore, Appellant admitted at the November 14, 2011 Preliminary Revocation Hearing (Record at 239–241) and in his August 7, 2012 Motion to Vacate, Set Aside or Correct Sentence Pursuant to RCr 11.42 filed in Fayette Circuit Court Criminal Action Nos. 07-CR-00944 and 10-CR-00977 (Record at 262 -274) that he had relied on Ms. Paisley's advice in deciding to enter his guilty plea.

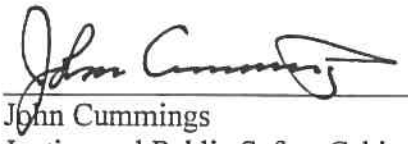
In comparison, the record is void of any probative evidence establishing that the Commonwealth Attorney did anything to mislead Appellant in any way. As stated above, the Appellant "has already recognized that the plain language of the plea bargain was upheld [by the Commonwealth Attorney]." (Record at 295). Moreover, the Appellant concedes that "[i]t is unclear whether the Commonwealth Attorney was unaware of the change of statute[.]"). (Record at 3). In light of Appellant's admission that he does not know whether the Commonwealth Attorney knew about the change of statute (Record at 295, 296), the Appellant's conclusory, self-serving assertions of bad faith and deceit on part of the Commonwealth Attorney are completely unsupported by the record.

The only conclusion reasonably supported by record is that Ms. Paisley and the Commonwealth Attorney were both operating under a mutual mistake of law as to the Commonwealth Attorney's statutory authority under KRS 532.043 to decide whether revocation proceedings would be instituted by deciding whether or not to file a motion with the circuit court to revoke an offender's conditional discharge. A mutual mistake of law generally does not even justify relief from the written agreement. Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699 (Ky. 2006), *as modified on denial of rehearing* (Mar. 22, 2007). It certainly does not justify the relief sought by Appellant.

CONCLUSION

For all the foregoing reasons, the Kentucky Parole Board respectfully requests this Honorable Court to affirm the Order of the Court of Appeals.

Respectfully submitted,



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